SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 245

STATE OF MINNESOTA,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF SAINT PAUL,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT.

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INDEX

TABLE OF CASES

31543

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The brief for petitioner was received so late, we ask permission in respondent's behalf to file this supplementary brief.

I.

INSUFFICIENT ASSIGNMENT OF ERROR

The judgment here for review rests upon the findings of fact made in the trial court. (District Court, Ramsey County, Minnesota.) None of those findings are assigned as error by petitioner, but instead, the four assignments made refer exclusively to the opinion of the Supreme Court rendered upon the previous appeal.

A specification of error which refers only to statements in an opinion delivered by a court is not sufficient to present any question for review.

Smart vs. Wright, 227 *Fed.* 84.
Childs vs. Williams, 212 *Fed.* 151.
Mason vs. United States, 219 *Fed.* 547.

As pointed out in our main brief (pp. 52-54) the eighth finding of the District Court was a general finding of the ultimate and controlling facts and sufficient to support the judgment.

Hewitt vs. Blumenkranz, 33 *Minn.* 417.

It is now sought to avoid the effect of this finding by claiming it to have been based upon an erroneous conception of law and that so construed it will be reviewed by this Court.

The petitioner under the Minnesota practice had the right to develop that condition, if it existed, by asking for more specific findings in which the different forms of moneyed capital and the amounts of each would be shown, also the amount held to be material and how and why any such form came into competition, but having elected to rest upon a general finding of fact sufficient to support the legal conclusions and judgment, will not be permitted to extend the finding beyond the plain meaning of the language actually used.

We submit this is a matter of substance and goes far beyond a mere technical objection to insufficient assignments of error which we realize this Court might readily disregard in the interests of justice.

It is not sufficient to say the finding was a mere formality in accordance with the previous conclusions of the Supreme Court. When the actions went back for retrial they were before the court for trial *de novo*. The submission of the actions upon the evidence already taken to no extent interfered with the right of petitioner to move for specific or additional findings, in which those, if any, based upon legal

conclusions could have been set out and findings of fact separately stated.

But beyond this we insist counsel misinterpreted the decision of the Supreme Court of Minnesota, in claiming it to have been based entirely upon bonds and promissory notes and book accounts in the hands of individual citizens not engaged in banking or a similar business, and also in saying (p. 30):

> "and involved in the finding" (8th) "is the theory of law that bonds, and possibly notes and book accounts, are per se moneyed capital coming into competition with national banks."

The Supreme Court of Minnesota referred to some of the items listed as money and credits and then said (R. p. 316):

> "Defendant contends that these items, *and also other items,* assessed as credits and aggregating large amounts, represent moneyed capital employed in competition with national banks." (our italics)

The Court discussed petitioner's claims as to bonds, investments of surplus funds, promissory notes and also the testimony as to other forms of moneyed capital, but nowhere confined its final conclusion to the specific items of bonds, promissory notes and book accounts—instead its conclusion was (R. p. 323):

> " • • • That moneyed capital in the hands of individual citizens, taxed at the 3-mill rate and too large in amount to be overlooked or disregarded, is employed in competition with national banks within the meaning of Section 5219 as interpreted by the Supreme Court of the United States."

In reply to the contention that the taxing statutes upon their face showed discrimination against national banks, the Court said (R. p. 316):

> "Although there is force in this contention, the present case does not rest upon it."

In our main brief we endeavored to point out how far we went beyond a mere showing as to the moneyed capital returned under the money and credits act of 1911. But let it be assumed that such was our principal showing. If in fact the testimony went further, as we think must be conceded, it became important to know the extent to which other moneyed capital was shown, and which of the moneyed capital so shown was found by the court to be competitive and the amount of such competitive capital which the Court deemed material.

Counsel are not at liberty to play fast and loose—to rest without remonstrance upon a general finding and then attack it without having assigned it as erroneous, upon the claim that the *principal* evidence in the case was directed to some erroneous theory of law.

II.

THE MONEY AND CREDITS TAX IS NOT EQUIVALENT TO THE TAX UPON SHARES OF NATIONAL BANKS.

Counsel have persistently argued that Chapter 285, Laws 1911, Section 2316 General Statutes 1913 (Appendix D), imposed as great a tax upon money and credits in the hands of individual citizens as that imposed upon shares in national banks. This claim is based upon the fact that

in ascertaining the value of the shares the liabilities of the bank are deducted from its resources, while the individual taxpayer is required to pay the 3-mill tax upon money and credits without the deduction of his individual debts; therefore, it is claimed (p. 25 petitioner's brief) the 3-mill tax is equal to that which would be paid by the *bank* should its resources be similarly taxed.

The tax authorized by Congress is not a tax upon the *bank* but upon the *shares* in national banks held by individuals.

Van Allen vs. The Assessors, 3 *Wall.* 573.

The deduction of the liabilities from the resources of the bank is necessary to find the actual value of the shares. No deduction is allowed for the individual debts of the shareholder, so that while the moneyed capital in the form of national bank shares is taxed at the high rate, other moneyed capital bears another and lower rate.

There is no equivalency in fact and this Court has held there is none in law.

Owensboro Nat'l Bank vs. Owensboro, 173 *U. S.* 664.
Home Savings Bank vs. Des Moines, 205 *U. S.* 503.

The question here is as to the power of the State, not what might have been the condition under other circumstances and other laws. Congress permits the taxation of shares in national banks with specified restrictions, and the State acting under and because of that permission has only the limited power conferred upon it. Thus, as said in *Home Savings Bank vs. Des Moines, supra,* p. 519:

> "If the State has not the power to levy this tax, we will not inquire whether another tax which it might

lawfully impose would have the same ultimate incidence."

And in the Owensboro case, *supra,* it was said, p. 683:

> "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

III.

THE FACT THAT THE 3-MILL RATE RESULTED IN DISCLOSING ADDITIONAL TAXABLE PROPERTY IS IMMATERIAL.

For the purpose of showing the beneficial effect of the money and credits act of 1911 by securing returns for taxation of additional property and with the further purpose of showing that no actual hostility towards national banks exists in Minnesota, counsel for petitioner present tabulations showing year by year the increase in the amount of money and credits returned for taxation.

This may also be true of the mortgage registry tax of 1907 and of some of the other statutes classifying property for taxation.

We fully recognize, as said by this Court, that Section 5219 was not intended to interfere with the policy of the State in framing its general plan of taxation; the general policy of the State is for it to determine, but having made its determination it must tax shares of national banks in accordance with the policy it has adopted in the case of its own citizens as to other and competing moneyed capital.

People vs. Weaver, 100 *U. S.* 539.
People vs. Commissioners, 4 *Wall.* 244.

A similar argument was apparently advanced in the case of *Eddy vs. First National Bank of Fargo,* 275 *Fed.* 550, *and in reply* the Circuit Court of Appeals through Circuit Judge Hook said (p. 552):

> "It is contended that, were it not for the state statute fixing the small 3-mill rate, much of the individual moneyed capital would escape taxation. If so, it would be largely due to a failure to enforce the laws against individual evasion of taxes, and if that condition, being recognized, is dealt with by statute so broadly as here, substantially equal treatment should be accorded the shares of national banks individually held."

The paving of the State with good intentions will not prevent condemnation of its invalid law.

IV.

RESPONDENT WOULD BE INJURED IF COMPELLED TO PAY AN UNLAWFUL TAX.

At page 45 of petitioner's brief it is argued that in determining the validity of the taxing statute the moneyed capital represented by mortgages will not be considered, as the evidence was that respondent held no mortgages and therefore was not injured by the lower tax on that form of security. This argument is based upon *Albany County vs. Stanley,* 105 *U. S.* 305, and *Citizens National Bank vs. Kentucky,* 217 *U. S.* 443. Neither of these support counsels' contention.

In the Stanley case the action was brought by the assignee of individual shareholders in a national bank. The statute under which they had been compelled to pay the tax

was valid upon its face. It provided (p. 309) that no tax should be assessed against the bank but that the stockholders should be assessed and taxed upon the value of their shares but at no greater rate than that assessed upon other money capital in the hands of individuals in the State.

The State Court had held that the debts of the individual stockholders were not deductible from the value of the shares owned by them, and inasmuch as that privilege was given to the owners of personal property other than bank shares, the statute was attacked as in conflict with Section 5219.

In that case the statute was valid upon its face and the rate provided for was entirely within the restrictions imposed by the Act of Congress; whether its enforcement resulted in discrimination against a particular individual depended upon his individual financial condition and this Court held that a shareholder who failed to show he individually was discriminated against would not be heard to claim the statute was invalid.

Here we have a case in which the rate at which shares of national banks are taxed is attacked as not conforming to the rate provided for other moneyed capital. The tax is assessed upon the value of the shares, exclusive of real estate. The character of the assets of the bank are immaterial except as they affect the amount finally taken as the taxable value of the shares.

The test therefore comes when the tax imposed upon the moneyed capital of the shareholder, represented by his investment in the shares of stock, is compared with the tax imposed upon other forms of moneyed capital in the hands of individuals.

The rate upon other moneyed capital is made the standard, and in order that it may be a fair standard it must be

invested in securities "such as normally enter into the business of banking."

Merchants Natl. Bank vs. Richmond, 256 *U. S.* 635-639.

It is precisely the same as though Congress fixed a definite rate beyond which the State had no authority to go.

To enforce a rate beyond such lawful authority would injure the taxpayer and deprive him of property without due process of law.

The respondent here resists the tax as the agent of the shareholders, and whether or not it deals in real estate mortgages is immaterial.

The other case, *Citizens Natl. Bank vs. Kentucky,* cited by counsel is obviously not authority for their claim.

V.

CHAPTER 416, LAWS 1921, WAS INTENDED TO FAVOR STATE BANKS.

This appears not only from the Act itself, but from the report of the Tax Commission of Minnesota, referred to by counsel on page 6 of petitioner's brief. This reference, coupled with the reiterated claim that no hostility towards national banks was shown and that no unfair discrimination resulted from the various acts of the Legislature makes it proper to give the statement here.

Prior to this Act of 1921, shares in both state and national banks were equally taxed, and in Ch. 8 of 9th Biennial Report, 1924, p. 114, the Tax Commission said the following as to the purpose in making the change:

> "The radical change in the method of taxing state banks brought about by the enactment of Chapter 416 was made by the Legislature for the specific purpose of enabling state banks to avoid a ruling of the treasury department of the federal government, which held that banks in making their income tax returns, could not deduct from their gross income the amount of state and local taxes paid by them, because, as the department claimed, such taxes were not a charge against the banks at all, but were a direct charge against the stockholders."

If this statute could be sustained the following would be the result, first, by placing the tax directly upon state banks, relieve them from the payment to some extent of *Federal* taxes, a privilege not then shared by national banks. Second, by valuing the moneyed capital by the same method as that used to determine the value of shares, to prevent any loss in *State* tax.

> *I. T.* 1629 *Int. Rev. Cum. Bul. January-June* 1923, *p.* 161.

The Federal Revenue Act was amended in 1924 and the Department ruled taxes assessed against shareholders and paid by the Bank might be deducted.

> *Regulation* 65 *Income Tax Act* 1924, *Art.* 566, *p.* 163.

The Legislature of Minnesota in 1925 repealed Ch. 416, Laws 1921 and restored the method in force prior to 1921 of taxing shares in state and national banks. This statute is Ch. 304, Laws 1925, p. 385. Counsel for petitioner inadvertently gave it on page 6 of their brief as Ch. 306, Laws 1925.

In the case of *First National Bank of Guthrie Center vs. Anderson,* 269 *U. S.* 341, this Court said at page 348:

> "But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction."

It may be said we should consider only the burdens imposed by the State and that it is a matter of no concern what burdens the Federal Government imposes upon its national banks, but that would not change the effect of the statute. Its enactment brings us squarely back to the original proposition—that the State having adopted a policy toward those subject to its control must extend an equally liberal policy to shares of national banks.

In this instance, having provided that shares of state banks should go entirely untaxed, it was without power to impose any tax upon shares of national banks. This is a discrimination resulting entirely from the statute of the State and we submit must be condemned.

Des Moines National Bank vs. Fairweather, 263 *U. S.* 103.

VI.

COMPETING MONEYED CAPITAL.

The argument presented by the very able counsel for petitioner would, if sound, render Section 5219 entirely ineffective.

It must be conceded that any moneyed capital in Minne-

sota other than shares in national banks is, when taxed at all, taxed at a rate much lower than such shares, also that a huge amount of moneyed capital was shown. This leaves only the matter of competition and counsel's argument is to the effect that no competition is possible except between state and national banks and possibly some undefined business concern engaged in *direct* competition with banks.

On page 33 of their brief counsel say:

> " * * * * * if the judgment is to stand the affirmance must be upon the ground that the evidence was such as to *require* a finding and determination *here* that a substantial amount of moneyed capital employed as in the banking or investment business was taxed at a lower rate than bank shares." (Our italics.)

This is plainly erroneous, as the evidence need not be such as to *require* a finding *here*. If this Court deems it necessary to examine the evidence at all it will only do so to determine whether there was *any* evidence to support the findings of the State Court.

There was, however, ample evidence

> "that a substantial amount of moneyed capital employed as in the banking or investment business was taxed at a lower rate than bank shares."

It was shown (Exhibit Q) that investment companies reported to the Reserve Bank mortgages, bonds, stock and securities to the amount of eighty-one million in 1921 and one hundred and ten million in 1922. That trust companies held for individuals some fifty million (R. pp. 26, 37, 65, 66, 140). That commercial paper was annually negotiated through note brokers to the extent of one hundred million (R. pp. 124, 127, 131, 136). That annual bond sales amount-

ed to fifty million (R. pp. 121, 123). That mortgages, including those mentioned, were negotiated annually to the amount of at least one hundred and eighty million.

It was thus shown that investment concerns were dealing upon a large scale in securities which normally enter into the business of banking. Some of these were corporations, and in such case the property of the corporation was taxed at the low rate and the shares of stock went entirely untaxed. If it be claimed the tax upon the property of the corporation is not the test, then the absence of any tax upon the shares of stock representing the individual investment renders void the statute taxing shares in national banks.

Counsel for petitioner recognize this situation, and attempt, at pages 47-49 of their brief, to avoid the effect of decisions of this Court in several cases, including *Mercantile National Bank vs. New York*, 121 *U. S.* 138, where it was said (p. 157):

> "The terms of the Act of Congress therefore include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money."

The arguments advanced by counsel in support of their claim seem without merit if not entirely meaningless. They say that under the *ad valorem* system, to tax the property of the corporation and also the shares would be double taxation, but assuming that to be true, the state might have taxed the shares of such corporations upon the same basis as national bank shares, and neither double taxation nor improper classification would have resulted.

Counsel do concede shares in state banks to be moneyed

capital within the meaning of Section 5219 (p. 47 petitioner's brief). These were shown to have been of the aggregate value of more than forty million dollars and under Ch. 416, Laws 1921 (Appendix A) were entirely untaxed.

Respectfully submitted,

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